Supreme Court, U.S.
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No. 01-1243

In the Supreme Court of the United States

BORDEN RANCH PARTNERSHIP AND
ANGELO K. TSAKOPOULOS, PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS AND
ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether deep ripping, an activity that disgorges and redeposits soil in wetlands and waters of the United States to convert those areas to dry land, may result in a discharge of a pollutant for purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Whether petitioners' deep ripping of a wetland qualified for the conditional exemption from regulation under Section 404(f) of the Clean Water Act, 33 U.S.C. 1344(f).

3. Whether each violation of the Clean Water Act should be counted in determining the maximum civil penalty under Section 309(d) of the Clean Water Act, 33 U.S.C. 1319(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-22) is reported at 261 F.3d 810. The district court's amended order on cross-motions for summary judgment (Pet. App. 28-56) and its findings of fact and conclusions of law (Pet. App. 67-121) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2001. A petition for rehearing was denied on November 28, 2001 (Pet. App. 208). The petition for a writ of certiorari was filed on February 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners engaged in a practice known as "deep ripping" to convert ranch land to vineyards and orchards. The Environmental Protection Agency (EPA) issued an administrative order under the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, to halt that activity on wetland areas. Petitioners filed a suit challenging the authority of EPA and the United States Army Corps of Engineers (the Corps) to regulate that activity, and the government counterclaimed, seeking injunctive relief and civil penalties in response to petitioners' CWA violations. The district court ruled that the government had authority under the CWA to regulate deep ripping and granted the government's request for injunctive relief and civil penalties. The court of appeals affirmed the district court's determinations that the government had authority to regulate deep ripping and that petitioners violated the CWA, but reversed the district court's finding of liability as to one isolated pool on petitioners' property and consequently remanded the case for recalculation of the civil penalty.

1. Congress enacted the Clean Water Act "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). To achieve that objective, Section 301(a) of the CWA prohibits the discharge of any pollutant into navigable waters, except in accordance with the pertinent provisions of the CWA. 33 U.S.C. 1311(a). The CWA defines the term "pollutant" to include a wide variety of materials, including dredged spoil, biological materials, rock, sand, and cellar dirt. 33 U.S.C. 1362(6) (Supp. V 1999). The CWA further defines the "discharge of pollutants" to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A).

Section 309(d) of the CWA provides that any person who violates Section 301 "shall be subject to a civil penalty not to exceed $25,000 per day for each violation." 33 U.S.C. 1319(d).

Section 301(a) of the CWA specifically forbids any discharge of dredged or fill materials from a point source into "waters of the United States," including wetlands (sometimes called "jurisdictional waters"), unless authorized by a permit issued by the the Corps pursuant to Section 404 of the CWA, 33 U.S.C. 1344 (1994 & Supp. V 1999). 33 U.S.C. 1311(a). See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985). The CWA regulates discharges into wetlands because those waters "maintain[] water quality by trapping sediment and toxic and nontoxic pollutants before they reach streams, rivers, or other open bodies of water." *United States* v. *Deaton*, 209 F.3d 331, 336 (4th Cir. 2000).

Section 404(f)(1) of the CWA provides an exception from the permitting requirement, known as the normal farming exemption, for "the discharge of dredged or fill material * * * from normal farming, silviculture, and ranching activities such as plowing." 33 U.S.C. 1344(f)(1) and (1)(A). Nevertheless, such discharges that are "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under [Section 404.]" 33 U.S.C. 1344(f)(2). The latter provision is referred to as the "recapture" provision.

2. The district court based its decision on detailed findings of fact, Pet. App. 67-92, which the court of appeals affirmed, *id.* at 11-12. Because petitioners' char-

acterization of the case relies on testimony and exhibits that the district court did not credit and in some respects specifically rejected as "not veracious" (*id.* at 73 n.2), we set out the facts, as found by the district court, in some detail. We also rely on undisputed facts set out in the district court's amended order granting partial summary judgment (*id.* at 28-56).

In June 1993, petitioner Tsakopoulos, the general partner of petitioner Borden Ranch Partnership, purchased Borden Ranch, an 8348-acre ranch located in California's Central Valley, for approximately $8.3 million. Pet. App. 2, 68. The ranch contained significant hydrological features, including vernal pools, swales, and intermittent drainages. *Id.* at 2, 68-69. Vernal pools are waters that generally occur at low points in the landscape where restrictive soil layers (or "claypans") cause water to collect and commonly serve as habitat for a distinctive mix of plants and animals adapted to the variation between wet and dry periods. *Id.* at 2, 69. Swales are sloped wetlands that allow the movement of vernal pool plants and animals to other aquatic features, slow peak water flows, filter water flows to maintain water quality, and minimize erosion and sedimentation. *Ibid.* The swales on Borden Ranch connect vernal pools to each other or to intermittent streams, which flow into creeks on the property, which in turn are tributaries of the Cosumnes and Mokelumne Rivers. *Id.* at 69.

Tsakopoulos intended to convert the relevant portions of Borden Ranch, which had previously been used as rangeland for cattle grazing, into vineyards and orchards and to subdivide it into smaller parcels for sale. Pet. App. 2, 44, 47, 68. Vineyards and orchards, however, have deep root systems that require water to penetrate much deeper than the restrictive layers in

the relevant parts of Borden Ranch allowed. *Id.* at 2, 44, 69. Their cultivation therefore requires "deep ripping," a process in which bulldozers drag rippers, consisting of four-foot to seven-foot metal prongs, through the earth. That activity breaks up the restrictive layer and disgorges earth, rock, sand, and biological material behind the ripper. *Id.* at 2-3, 44, 69-70. Deep ripping alters the movement of surface and subsurface water and limits or destroys the ability of wetlands to retain water. *Id.* at 48, 70.

Petitioner Tsakopoulos knew when he purchased Borden Ranch that it contained waters protected under the CWA and was informed by the Corps in mid-1993 that he would need to obtain a permit for deep ripping in those waters. Pet. App. 70-71. In fall 1993, he initiated deep ripping without a permit on a portion of the Ranch. *Id.* at 3, 71-72. The Corps subsequently granted him an "after-the-fact" permit for this deep ripping when he agreed to undertake certain mitigation activities. *Id.* at 3, 72.

The Corps and EPA again informed Tsakopoulos in fall 1994 that he was not to deep rip in protected waters, but the agencies discovered the following spring that more deep ripping had occurred without a permit. Pet. App. 3, 72-74.[1] The Corps thereupon issued a cease and desist order. *Id.* at 3, 74. In summer

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[1] Petitioners assert that the Corps "conceded" in late 1994 that "shallow plowing at root zone depth"—or discing—did not require a permit. Pet. 10. That assertion is inconsistent with the district court's findings after trial: "Tsakopoulos testified at the bench trial that the agency officials had stated at this meeting [in late September 1994] that the vernal pools could be legally disced without a permit. That testimony was not veracious and is belied by the consistent position federal officials expressed to Tsakopoulos on this matter." Pet. App. 73 n.2.

1995, Tsakopoulos initiated further deep ripping on other parcels of the Ranch without a permit, and in November 1995, the Corps determined that more protected wetlands had been ripped and issued another cease and desist order. *Id.* at 3, 74-75. In May 1996, the government entered into an Administrative Order on Consent (AOC) with Tsakopoulos that was intended to resolve his alleged CWA violations affecting 49.1 acres of waters of the United States. *Id.* at 3, 77. In the AOC, Tsakopoulos agreed to cease further discharges into waters of the United States unless he had appropriate authorization under the CWA. *Id.* at 78.

Further deep ripping of waters on Borden Ranch without a permit occurred in November 1996 and in spring 1997. Pet. App. 4, 79-80, 82-83. After EPA investigators visited the Ranch in April 1997 and observed fully-engaged rippers at work in jurisdictional wetlands, EPA issued an Administrative Order finding that Tsakopoulos had violated the CWA. *Id.* at 4, 83-84. In a meeting later that month, Tsakopoulos conceded that "mistakes had been made." *Id.* at 11, 85.[2]

3. Petitioners filed this action challenging the authority of the Corps and EPA to regulate petitioners'

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[2] Petitioners claim that "[r]elying on the Corps' oral and written advice, Tsakopoulos tried to plow in ways the Corps told him would not require CWA permits." Pet. 9. The district court's findings after trial do not support that claim:

> Tsakopoulos deliberately obfuscated his understanding of the Corps' guidance respecting driving over vernal pools and undermined the Corps' enforcement authority by wrongly stating that the agency gave him confusing guidance as to the nature of the contact he could have with jurisdictional waters. He knew he was not authorized to deep rip any jurisdictional features. These findings weigh against good faith.

Pet. App. 114.

deep ripping, which precipitated EPA's counterclaim, seeking injunctive relief and civil penalties for CWA violations in connection with petitioner Tsakopoulos' degradation and destruction of protected waters. Pet. App. 4. The parties cross-moved for summary judgment, and the district court granted partial summary judgment in favor of the government. *Id.* at 28-56. The district court dismissed petitioners' claims and held that petitioners' activities are subject to the Section 404 permitting process because they "may cause discharge of fill material or pollutant into waters of the United States." *Id.* at 41. The district court further held that petitioners' activities did not qualify for Section 404(f)(1)'s normal farming exemption, *id.* at 42-47, and that, even if they did, those activities were recaptured under Section 404(f)(2), *id.* at 47-49. The district court determined, however, that there remained disputed facts concerning the extent and effects of particular instances of deep ripping. *Id.* at 5, 41.

The district court resolved those factual issues through a four-week bench trial in which the court heard evidence from more than 20 witnesses and received hundreds of documentary exhibits. Pet. App. 5. The district court determined that petitioners' deep ripping had filled approximately two acres of jurisdictional wetlands and resulted in 358 CWA violations. *Id.* at 5, 103, 105. Although the district court observed that "[t]he relative seriousness of Tsakopoulos' violations and his lack of earnest effort to comply with the Act merit a significant penalty" (*id.* at 117), the court did not assess the maximum civil penalty of $8,950,000 and, instead, gave him the choice of paying a $1.5 million civil penalty or paying a $500,000 penalty and restoring four acres of wetlands. *Id.* at 5, 105. Tsakopoulos chose the latter option. *Id.* at 5.

4. The court of appeals affirmed "the district court's holding that deep ripping in this context is subject to the jurisdiction of the Corps and the EPA." Pet. App. 17. It noted that the courts of appeals have consistently held that redeposit of materials into waters of the United States can constitute an "addition of a pollutant" under the CWA. *Id.* at 6-8. It further stated that petitioners' contention "that no case has ever held a plow to be a point source * * * has no merit" because in this case, bulldozers and tractors were used to pull large metal prongs through the soil, and courts have found that bulldozers and other earthmoving equipment can constitute "point sources." *Id.* at 8-9.

The court of appeals rejected petitioners' contention that their deep ripping was exempt from regulation under Section 404(f)(1)'s normal farming exemption. Pet. App. 9-10. The court observed that the exemption is subject to a "significant qualifying provision", because "even normal plowing can be regulated under the Clean Water Act if it falls under this so-called 'recapture' provision" in Section 404(f)(2). *Id.* at 9. The court of appeals agreed with the district court that "[c]onverting ranch land to orchards and vineyards is clearly bringing the land 'into a use to which it was not previously subject,' and there is a clear basis in this record to conclude that the destruction of the soil layer at issue here constitutes an impairment of the flow of nearby navigable waters." *Id.* at 10. The court accordingly "conclud[ed] that the deep ripping at issue in this case is governed by the recapture provision" and that it was "entirely proper" for the government to exercise jurisdiction over petitioners' deep ripping. *Ibid.*

The court of appeals also affirmed the district court's calculation of the civil penalty. Pet. App. 12. It rejected petitioners' argument that they should only be

assessed $25,000 for any day in which ripping violations occurred regardless of the total numbers of rippings in the day, noting that the focus in the statutory penalty provision "is clearly on *each* violation" and that a contrary rule would encourage violators to "stack" violations on particular days. *Id.* at 13. The court of appeals concluded that petitioners' other challenges to the civil penalty assessment, none of which they raise here, lacked merit. *Id.* at 12.

The court of appeals reversed the district court's findings of CWA violations in one isolated vernal pool in light of the government's withdrawal of its enforcement claim with regard to that pool as a result of this Court's decision in *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). The court accordingly remanded the case to the district court for recalculation of the civil penalty. Pet. App. 10-11, 17. Judge Gould dissented. *Id.* at 18-22. He would have held "that the district court erred in finding that the activities here required a permit and otherwise violated the Clean Water Act." *Id.* at 22.

ARGUMENT

The court of appeals correctly concluded that petitioners violated the CWA and that the district court properly calculated an appropriate civil penalty. That decision does not conflict with any decision of this Court or of another court of appeals. The court of appeals' fact-specific decision does not raise any issue of exceptional importance warranting review by this Court.

1. The court of appeals correctly determined that "deep ripping, when undertaken in the context at issue here, can constitute a discharge of a pollutant under the Clean Water Act." Pet. App. 8. That determination reflects established law. Deep ripping is an activity in

which soil is "wrenched up, moved around, and redeposited somewhere else." *Ibid.* The courts of appeals have consistently recognized that activities in which dirt or similar organic material is disturbed or dug up and then redeposited may constitute an "addition" of a pollutant under the CWA if they occur in a water of the United States. See *United States* v. *Deaton*, 209 F.3d 331, 336-337 (4th Cir. 2000) (sidecasting dirt from ditch digging in wetland); *Rybachek* v. *United States EPA*, 904 F.2d 1276, 1285 (9th Cir. 1990) (dirt and gravel excavated from a streambed for placer mining and then returned there); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 923-925 (5th Cir. 1983) (redeposit of trees and vegetation dug up during land clearing). As the Fourth Circuit explained in *Deaton*, the question under the CWA is not whether "material" has been added to waters, but whether a "pollutant" has been added, and "plain dirt," once it has been disgorged, can become a pollutant. 209 F.3d at 335-336. Like other fill materials, it can harm a wetland and associated aquatic life by interfering with water circulation and filtration. Pet. App. 6-8 (quoting *Deaton* and citing other cases).

Petitioners nevertheless assert (Pet. 16-20) that the court of appeals' decision conflicts with *National Mining Ass'n* (*NMA*) v. *United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998). Petitioners are mistaken. *NMA* involved a challenge to a regulation known as the "*Tulloch* Rule," which subjected certain redeposits of dredging material, known as "incidental fallback," to CWA regulation. *Id.* at 1402. As the court of appeals in *NMA* explained, the term "incidental fallback" describes de minimis redeposits of soil during dredging operations, such as "when a bucket used to excavate material from the bottom of a river, stream, or wetland is raised and soils or sediments fall

from the bucket back into the water." *Id.* at 1403. The *NMA* court ruled that the Corps' decision to subject incidental fallback to its permitting requirements exceeded the Corps' authority to regulate the "addition" of "dredged material" into the waters of the United States because "the straightforward statutory term 'addition' cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion happens to fall back." *Id.* at 1403-1404. The court, however, expressly stated:

> [W]e do not hold that the Corps may not legally regulate some forms of redeposit under its §404 permitting authority. We hold only that, by asserting jurisdiction over "*any* redeposit," including incidental fallback, the *Tulloch* Rule outruns the Corps's statutory authority.

Id. at 1405. The Court specifically distinguished cases such as *Avoyelles* and *Rybachek*, cited above, as not involving incidental fallback, but regulable redeposits. *Id.* at 1406. The same distinction applies here.

The court of appeals correctly concluded in this case that, "[h]ere, the deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable deposit." Pet. App. 8 n.2. The court of appeals' conclusion rests solidly on the district court's factual findings that deep ripping moved earth, rock, sand and biological material both horizontally and vertically and that petitioners' deep ripping in this case filled approximately two acres of jurisdictional wetlands on Borden Ranch. *Id.* at 6-8, 70, 105. There is no serious question that fill activities of that character and magnitude are subject to CWA regulation. The *NMA* court itself specifically recog-

nized that activities such as "plowing, ditch maintenance, and the like" are distinguishable from the release of incidental fallback because they "may produce fallback, but they may also produce actual discharges, i.e. additions of pollutants." 145 F.3d at 1405. Thus, both the court of appeals in this case and the *NMA* court clearly perceived the distinction between incidental fallback and the type of activity involved here. To the extent that petitioners disagree with the lower courts' factual characterization of their deep ripping activities, that factual disagreement plainly does not present any issue warranting this Court's review.

2. Petitioners further contend (Pet. 20-21) that the court of appeals erred in holding that "plows" may constitute "point sources" (*ibid.*). The court of appeals correctly rejected petitioners' characterization of the activity involved here. Pet. App. 8-9. A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any * * * rolling stock * * * from which pollutants are or may be discharged." 33 U.S.C. 1362(14). As the court of appeals explained, the "point sources" in question here were the bulldozers and tractors pulling large metal prongs through the earth, wrenching the soil up, moving it around, and redepositing it somewhere else. Pet. App. 8-9. The courts have uniformly held that such earthmoving equipment may constitute point sources. See *United States* v. *Akers*, 785 F.2d 814, 817-820 (9th Cir.) (upholding issuance of injunction in CWA case involving rippers), cert. denied, 479 U.S. 828 (1986); *Avoyelles*, 715 F.2d at 922 (bulldozers and backhoes); see also *In re Alameda County Assessor's Parcel*, 672 F. Supp. 1278, 1284-1285 (N.D. Cal. 1987) (same); *United States* v. *Larkins*, 657 F. Supp. 76, 84-85 (W.D. Ky. 1987) (same), aff'd, 852 F.2d 189 (6th Cir. 1988),

cert. denied, 489 U.S. 1016 (1989). Petitioners do not cite any court of appeals decision that conflicts with that holding. And even accepting arguendo their inaccurate characterization of the facts here, petitioners cite no cases supporting their assertion that a plow cannot be a point source.

3. Petitioners next assert (Pet. 21-27) that the court of appeals erred in concluding that their activities did not fall within the "normal farming exemption." Petitioners' principal contention is that Congress never intended plowing to be regulated under the CWA and "never even considered it to produce 'discharges.'" Pet. 25. They are wrong. Section 404(f) of the CWA expressly recognizes that plowing can result in discharges of dredged or fill material 33 U.S.C. 1344(f). Section 404(f)(1)'s normal farming exemption states:

> (1) Except as provided in paragraph (2) of this subsection, *the discharge of dredged or fill material–*
>
> (A) *from normal farming*, silviculture, and ranching activities *such as plowing*, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices; * * *
>
> is not prohibited by or otherwise subject to regulation under this section or section 1311(a) or 1342 of this title.

33 U.S.C. 1344(f)(1) (emphasis added). Thus, Section 404(f)(1) recognizes that normal farming practices, such as plowing, may result in discharges of dredged or fill material, but it creates a conditional exemption for those discharges. Section 404(f)(2), the recapture provision, makes clear that the conditional exemption is

not available if the plowing at issue alters the hydrological regime of protected waters:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

33 U.S.C. 1344(f)(2). Thus, to qualify for the conditional exemption, one must demonstrate "that proposed activities both *satisfy* the requirements of Section 404(f)(1) and *avoid* the recapture provision of Section 404(f)(2)." *United States* v. *Brace*, 41 F.3d 117, 124 (3d Cir. 1994), cert. denied, 515 U.S. 1158 (1995); see *Akers*, 785 F.2d at 819; *Avoyelles*, 715 F.2d at 925. The courts of appeals have uniformly held that the normal farming exemption, as well as other exemptions under Section 404(f)(1), are to be construed narrowly. *Brace*, 41 F.3d at 124; *Akers*, 785 F.2d at 819; *United States* v. *Huebner*, 752 F.2d 1235, 1240-1241 (7th Cir.), cert. denied, 474 U.S. 817 (1985); *Avoyelles*, 715 F.2d at 925 n.44.

Petitioners also raise a number of fact-based challenges to the lower courts' application of the normal farming exemption and the recapture provision. Pet. 23-24, 25-26. Those challenges are without merit. For example, petitioners assert that the court of appeals "erroneously reasoned that '[c]onverting ranch land to orchards and vineyard is clearly bringing the land into a use to which it was not previously subject.'" Pet. 23-24. The lower courts found, however, as a matter of fact, that petitioners' activities "were not intended simply to

substitute one wetland crop for another; rather, they radically altered the hydrological regime of the protected wetlands." Pet. App. 10.[3]

The courts of appeals have consistently held that converting from silviculture to soybean production, and even from wetlands farming to dryland farming, can subject the activities in question to recapture under Section 404(f)(2). See *Akers*, 785 F.2d at 822-823 (wetlands to dryland farming); *Huebner*, 752 F.2d at 1240 (cranberries to barley, corn and other dryland crops); *Avoyelles*, 715 F.2d at 925 (forest to soybean production). See also *Brace*, 41 F.3d at 129 (conversion of pasturing of cattle and horses to cropping operation not exempted under Section 404(f)(1) and would be recaptured under Section 404(f)(2) in any event). Those decisions demonstrate that the courts have followed an intensely factual, case-by-case approach in determining the application of Section 404(f)(2). The court of appeals in this case correctly recognized, consistent with settled law, that when "plowing" is employed to

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[3] Petitioners claim that the court of appeals "confused the normal activity of converting from one agricultural crop to another with that of converting waters to wetlands." Pet. 23. However, petitioners did not convert from one crop to another—they converted from ranching to planting crops and their conversion activities radically altered the hydrological regime of protected waters and wetlands. Pet. App. 10. Petitioners also suggest that the court of appeals' holding means that "any change in agricultural crop or practice could subject plowing to federal regulation" (Pet. 24), but the court of appeals stated that this was not the case. See Pet. App. 10. Significantly, the dissenting opinion acknowledges that, if deep ripping can be viewed as a discharge, the recapture provision "defeats the exemption for any deep ripping that had the purpose of transforming land" and that here, "[m]ost violations found by the district court involved a purposeful attempt to transform the land." *Id.* at 21 (Gould, J., dissenting).

change an area's hydrological regime to the point that the wetlands or other waters are converted to dry land, any exemption that the plowing might otherwise have enjoyed is lost.[4] Petitioners assert at various points that the government's regulations exempt all forms of plowing from regulation. See Pet. 4, 8, 9, 19, 25. Petitioners, however, fail to quote the relevant regulations in their entirety. Those regulations state that the term "plowing" does "not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland." 33 C.F.R. 323.4(a)(1)(iii)(D); 40 C.F.R. 232.3(d)(4). Petitioners do not challenge the district court's factual finding that the deep ripping in this case redistributed soil and other surficial materials in a manner such that the hydrology of the affected waters "has been altered significantly" and that several of the waters were "completely obliterated." Pet. App. 106. Accordingly, the regulations relied upon by petitioners do not apply to their deep ripping.

Petitioners also rely on the Corps' definition of "fill material" to contend that plowing does not result in a discharge of fill material because its "primary purpose[] is to enhance and revitalize farming soil." Pet. 19. See 33 C.F.R. 323.2(e) (defining "fill material" to mean "any

[4] Petitioners assert (Pet. 26-27) that the court of appeals' decision conflicts with *Solid Waste Agency* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), to the extent that the court of appeals "unduly deferred" to EPA's application and interpretation of the CWA and EPA's own regulations. That supposed conflict is chimerical. The court of appeals did not cite any EPA regulations or defer to EPA at any point in its decision. Moreover, the court of appeals followed the holding in *Solid Waste Agency* in reversing the district court's findings of CWA violations with regard to one isolated vernal pool. Pet. App. 11.

material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an *[sic]* waterbody"). The court of appeals in *Avoyelles* rejected a similar argument, stating that the defendants' landclearing activities, however the defendants might choose to characterize them, in fact "'chang[ed] the bottom elevation of [the] waterbody'" and "were designed to 'replace the aquatic area with dry land.'" 715 F.2d at 924-925 (quoting 33 C.F.R. 323.2(e)). That is likewise what occurred in this case. See, *e.g.*, Pet. App. 43-45.[5]

4. Petitioners mistakenly claim (Pet. 27-28) that the court of appeals erred in affirming the district court's calculation of the maximum civil penalty that might be assessed against them. The district court properly calculated the maximum civil penalty in accordance with established law by multiplying the statutory maximum amount by the number of individual violations. See Pet. App. 16, 102-104. The court of appeals affirmed the district court's "careful analysis of the penalty issue on the facts of this case," remanding it only for a determination of "what, if any, reduction in the penalty is

[5] Petitioners admitted in their request for summary judgment that their plowing "unavoidably and *by design* changes the 'hydrological regime' of land by allowing surface water to penetrate more deeply into the soils." E.R. 434 n.17 (emphasis added). See *id.* at 465 para. 8 (deep ripping is required before planting vineyards and orchards because those crops "require water to penetrate down into the root zone"). As a result, petitioners' deep ripping met the requirements of the Corps' definitions of "discharge of fill material." Petitioners are wrong in suggesting (Pet. 6, 19) that this case bears any similarity to *Resource Investments, Inc.* v. *United States Army Corps of Engineers*, 151 F.3d 1162 (9th Cir. 1998). In that case, the court determined that the placement of a municipal solid waste landfill was not intended to change the hydrological regime of the wetland. *Id.* at 1168.

appropriate" with regard to the vernal pool withdrawn from the case. *Id.* at 16, 17.

Section 309(d) of the CWA provides that any person who violates Section 301 of the Act "shall be subject to a civil penalty not to exceed $25,000 per day for each violation" and specifies several factors to be considered in determining the ultimate penalty amount. 33 U.S.C. 1319(d). In this case, the district court noted that "[t]he parties apparently agree that each pass [of the ripper] constitutes a separate violation," Pet. App. 103, and it accordingly counted the number of times the deep ripper passed through protected waters and multiplied that number by $25,000, arriving at a maximum statutory penalty of $8,950,000. *Id.* at 103-104. That court also considered the number of days that petitioners were in violation in determining the penalty, stating that "the day on which a discharge occurred is the only day that will be counted in determining the maximum penalty." *Id.* at 102-103. It then analyzed the factors identified in Section 309(d) and reduced that amount to $1.5 million, giving Tsakopoulos the option, which he ultimately chose, to reduce the penalty even further to $500,000, provided that he agree to undertake restoration of four acres of wetlands. See *id.* at 104-118, 129.

Petitioners' contention that the lower courts misread the statute are without merit. Contrary to their argument that the lower courts "read the words 'per day' out of the statute," Pet. 28, the district court explicitly considered how to calculate the number of days in determining the penalty, Pet. App. 102-103. Moreover, Section 309(d) states that a maximum penalty of $25,000 shall be imposed "per day for each violation," 33 U.S.C. 1319(d)—not "per day for each category of violation" or "per daily violation unit," as petitioners contend (Pet. 28). As the court of appeals observed, "[t]he

focus is clearly on *each* violation, and courts have consistently rejected attempts to limit civil penalties to the number of days in which violations occur." Pet. App. 13.

For example, in *Atlantic States Legal Foundation, Inc.* v. *Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990), the court stated that "there is no daily cap of $25,000," and that "*each* excessive discharge of a pollutant on a given day will subject the polluter to a $25,000 maximum fine." *Id.* at 1139. Petitioners' approach, which would focus instead on the "*daily violation units*" or "*categories* of CWA violations" (Pet. 28), is plainly at odds with *Tyson Foods*. As the court of appeals explained, under petitioners' approach a defendant who unlawfully deep ripped hundreds of times through hundreds of acres of wetlands in a single day would be subject to the same maximum penalty as someone who ripped through one wetland on a single occasion—$25,000. Pet. App. 13. See *United States* v. *Smithfield Foods, Inc.*, 191 F.3d 516, 528 (4th Cir. 1999) (noting incentive problems with limiting maximum penalty to $25,000 per day).[6]

Petitioners' reliance (Pet. 28-29) on *Chesapeake Bay Foundation, Inc.* v. *Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986), is misplaced. This Court vacated that decision in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), and it therefore does not create a genuine conflict

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[6] Petitioners mistakenly rely (Pet. 28, 29) on *Hawaii's Thousand Friends* v. *City & County of Honolulu*, 821 F. Supp. 1368 (D. Haw. 1993). The district court in that case did not place a maximum $25,000 per day cap on penalties, holding instead that multiple violations attributable to a single day would each be assessed the maximum penalty of $25,000. *Id.* at 1395.

among the courts of appeals. In any event, the decision is not relevant here because it discusses a version of Section 309(d) that is no longer in force. (The same is true of *United States* v. *Amoco Oil Co.*, 580 F. Supp. 1042, 1046 n.1 (W.D. Mo. 1984), also cited by petitioners (Pet. 29).) The statutory provision at issue here—imposing a penalty of "$25,000 per day for each violation"—did not come into effect until 1987. *Tyson Foods*, 897 F.2d at 1138-1139. In any event, as the court of appeals noted, the court in *Chesapeake Bay Foundation* explicitly declined to reach the question presented in this case, which is "whether multiple violations attributable to a single day may give rise to a maximum penalty in excess of [the penalty amount] for that day." Pet. App. 13-14 (quoting *Chesapeake Bay Found.*, 791 F.2d at 308 n.8).

As this Court has stated, CWA penalty calculations are "highly discretionary." *Tull* v. *United States*, 481 U.S. 412, 427 (1987). The court of appeals considered petitioners' objections to the district court's penalty assessment and determined that "it is impossible to conclude that the district court's careful analysis of the penalty issue on the facts of this case was an abuse of discretion." Pet. App. 17. Petitioners' challenges to that penalty assessment present no issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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